IN THE
MISSOURI SUPREME COURT

TERRANCE ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 92101**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI
32nd JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE WILLIAM L. SYLER, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

POINTS RELIED ON

I.

JUDGE SYLER - DISQUALIFICATION REQUIRED

The motion court, Judge Syler, clearly erred in denying the motion to disqualify him because a reasonable person would have grounds to find an appearance of impropriety and doubt his impartiality. The entire record shows his extrajudicial discussions with the first trial's foreperson caused him to prejudge Terrance's 29.15 claims that Drs. Lewis and Holcomb should have been called as penalty mitigation witnesses.

Because of his extrajudicial conversations with that foreperson Syler concluded before he heard any 29.15 evidence that the first trial's evidence "was so discredited" it was unnecessary to present what Lewis and Holcomb might testify to, he "doesn't buy any of it," and that he "agreed with what" the first jury thought about Dr. Lewis.

Syler relied on what the foreperson told him to "explain" to direct appeal counsel the reason for the first jury's verdict and relied on in the findings his opinions formed from his extrajudicial conversations with the foreperson to reject Terrance's 29.15 claims.

Syler's extraordinary act of handing 29.15 counsel a New Yorker article discussing Lewis and having nothing to do with this 29.15 before hearing any evidence was done because Syler believed it confirmed the foreperson's reporting that Lewis was "ineffective."

State v. Smulls,935S.W.2d9(Mo.banc1996);

State ex rel. McCulloch v. Drumm,984S.W.2d555(Mo.App.,E.D.1999);

State v. Hunter,840S.W.2d850(Mo.banc1992);

Haynes v. State,937S.W.2d199(Mo.banc1996);

U.S. Const. Amends. VIII, XIV.

II. & III.

STEPFATHER ROBERT'S VIOLENCE

The motion court clearly erred in denying the 29.15 claims counsel was ineffective for failing to call Dr. Lewis to testify for the limited purpose of the impact on Terrance of his stepfather Robert's violent, abusive behaviors and failing to call Earline Smith to testify about Robert's violence because the "decision" not to present Robert's violence was premised on counsels' mistaken belief these matters were presented at the first trial, when they were not, and counsel wanted to do something "different" from the first trial by avoiding Robert's violent history. Because the "decision" not to present evidence of Robert's violence was premised on the mistaken belief the first trial's jury heard about Robert's violence that "decision" could not be a reasonable strategic "decision."

There was direct evidence Robert physically abused Terrance and exposed Terrance to violence directed at others and counsel possessed documents detailing these matters. Dr. Lewis found Robert had intentionally broken Terrance's leg when he was four years old. Drs. Pincus and Cross saw cigarette burns on Terrance's back that Robert inflicted. Robert's arrest records documented violent acts Robert committed while Terrance was a child growing-up in Robert's household.

Butler v. State,108S.W.3d18(Mo.App.,W.D.2003);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

Wiggins v. Smith,539U.S.510(2003);

U.S. Const. Amends. VI, VIII, XIV.

ARGUMENT

I.

JUDGE SYLER - DISQUALIFICATION REQUIRED

The motion court, Judge Syler, clearly erred in denying the motion to disqualify him because a reasonable person would have grounds to find an appearance of impropriety and doubt his impartiality. The entire record shows his extrajudicial discussions with the first trial's foreperson caused him to prejudge Terrance's 29.15 claims that Drs. Lewis and Holcomb should have been called as penalty mitigation witnesses.

Because of his extrajudicial conversations with that foreperson Syler concluded before he heard any 29.15 evidence that the first trial's evidence "was so discredited" it was unnecessary to present what Lewis and Holcomb might testify to, he "doesn't buy any of it," and that he "agreed with what" the first jury thought about Dr. Lewis.

Syler relied on what the foreperson told him to "explain" to direct appeal counsel the reason for the first jury's verdict and relied on in the findings his opinions formed from his extrajudicial conversations with the foreperson to reject Terrance's 29.15 claims.

Syler's extraordinary act of handing 29.15 counsel a New Yorker article discussing Lewis and having nothing to do with this 29.15 before hearing any evidence was done because Syler believed it confirmed the foreperson's reporting that Lewis was "ineffective."

When this Court reviews the entire record it establishes that Judge Syler prejudged Terrance's claims that counsel was ineffective for failing to call Drs. Lewis and Holcomb based on his years of extrajudicial conversations with the first trial's foreperson. A reasonable person would have grounds to find an appearance of impropriety and doubt Syler's impartiality. *See State v. Smulls*,935S.W.2d9,17(Mo.banc1996) and *Aetna Life Co*. v. *Lavoie*,475U.S.813,825(1986). Terrance was denied due process, freedom from cruel and unusual punishment, and a full and fair hearing. U.S. Const. Amends. VIII and XIV.

In *State v. Hunter*,840S.W.2d850,855(Mo.banc1992), the defendant waived counsel, pled guilty, and was sentenced to death. On appeal, it was alleged there was the appearance of bias by the judge who served because he made comments encouraging Hunter to waive counsel. *Id.*865-66. That claim was rejected because "**[a] review of the entire record**" in context showed the plea court had counseled against waiving counsel. *Id.*865-66(emphasis added). In Terrance's case, a review of the entire record viewed in context shows Judge Syler was required to disqualify himself because of the appearance of impropriety and reason to doubt his impartiality. *See Smulls*,935S.W.2d at 17; *Aetna*,475U.S.at 825.

The defendant in *Haynes v. State*,937S.W.2d199,201-02(Mo.banc1996) pled guilty and at sentencing the judge made statements conveying his outrage about the acts the defendant committed and referring to the defendant in derogatory terms. This Court rejected Haynes' motion to disqualify the plea judge from hearing his 24.035

case because the judge's comments were premised on the allegations found in the information, presentence report, and victim testimony he heard. *Id.*204. This Court went on to note that there was no basis to infer the plea judge "had prejudged any issue" presented in the 29.15 case. *Id.*204. This Court also discussed other assorted cases which had found that disqualification was required noting: "The threads common in all of these cases requiring recusal is either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for an illegitimate purpose." *Id.*204.

The record here when viewed in its entire context shows that Judge Syler prejudged Terrance's claims that counsel was ineffective for failing to call Drs. Lewis and Holcomb because of his years of extrajudicial discussions with the first trial's foreperson.

Motion To Transport For Testing Hearing

At the September 13, 2010, hearing on 29.15 counsels' motions to transport Terrance for MRI and EEG testing 29.15 counsel explained that allowing the testing would not be unduly burdensome on Corrections because Terrance had only to be transported two miles away to Washington County Hospital(2nd29.15Tr.5-6). Respondent's counsel agreed there was no undue burden imposed on Corrections, and therefore, had no objection to granting the request to transport Terrance(2nd29.15Tr.6). That was followed by:

THE COURT: Well, haven't we been down this road before?

MS. LEFTWICH: There's not ever been an MRI done, Judge, or an EEG. I think there was one requested way back prior to the trial in 2001. It was requested ex parte at that point, and I think that the Court denied the ex parte request, but there has not been one that's ever been done since that time. And again, it was recommended by a psychiatrist and a neurologist that that be had.

THE COURT: That was in the first case.

MS. LEFTWICH: That was in the first case. I mean, they would still have the same recommendation. In fact, Dr. Lewis did recommend it at this trial, but one was not requested from the Court or done, and they ended up not putting on any mental health evidence at this particular trial.

THE COURT: **It seems to me that that was so discredited the first time around, that it was not necessary to put it on the second time.**

MS. LEFTWICH: I don't know that, if it was discredited. I don't know that anyone polled the jury on that issue as to that being why they didn't give him life without in regard to Debbie Rainwater. So I don't know that that fact, that, in fact, that it was discredited, Your Honor. It may have been something with the way it was presented and it didn't have any hard evidence to back it up, which is what we're trying to investigate at this time for mitigation purposes as well, Judge. Not just for -- Obviously this is just a penalty phase. I think it was requested previously to be used in the guilt and the penalty phase perhaps.

THE COURT: I can only speak about a conversation I had with the foreperson of the first jury, giving me his **insight** on the matter. He's no longer alive, however.

MS. LEFTWICH: But he did speak with you in that regard, I'm assuming?

THE COURT: Yeah. I think basically his point was pretty well trashed, and they didn't believe him. That's just off the record conversation long after it happened.

MS. LEFTWICH: I believe there's ample evidence in regard to, that there could be brain damage for Terrance Anderson in regard to the amniotic fluid being affected at the time of his birth which can cause problems with the brain structure actually, Judge, as well as his mother has a history of epilepsy which can cause seizures which we don't know if he has that problem. That's the reason for the EEG. In addition, the neurological test by Dr. Pincus showed some abnormalities. That's the reason why we're requesting it, Your Honor.

THE COURT: The State does not object?

MR. BRUCE: **The State doesn't buy any of it**, but yeah, we don't object to them proceeding with their attempt to develop evidence.

THE COURT: **I don't buy any of it, either**, but in an abundance of caution to keep it from being an issue later on, I will sign off on the orders. That's the only reason. Anything else for the Movant?

MS. LEFTWICH: No, Judge.

(2nd29.15Tr.6-8)(emphasis added).[1]

Motion To Disqualify Judge Syler Hearing

At the November 8, 2010, hearing on the motion to disqualify Syler, counsel argued why Syler's statements at the motion to transport hearing premised on his extrajudicial conversations with the first trial's foreperson reflected that he should be disqualified(2nd29.15Tr.10-12). Counsel noted that Syler had previously indicated that he spoke to the foreperson years after the first trial(2nd29.15Tr.12-13). The argument on these matters included:

> MS. LEFTWICH: Years after the case was over. And so, Judge, I would consider that extrajudicial. It's nothing that's on the record. It's nothing that anyone had an opportunity to interview that foreperson because I think you also indicated that he is now deceased.
>
> THE COURT: That's correct.
>
> MS. LEFTWICH: And so I wouldn't take it out of the realm of extrajudicial information that was given to the Court because it was not something that was presented during the trial and was not something to be recorded, and it happened some years after the first trial in this case.
>
> THE COURT: Well, the only point I was trying to make was that it appeared from the comments of the foreperson of the jury that **the use of Ms.**

[1] All of the transcript records establishing why Judge Syler was required to disqualify himself are included in this reply brief's Appendix.

Lewis or Dr. Lewis, I should say, was **ineffective**. That was a decision made by **the jury**, not by the Court. Frankly, **I agreed with what they thought**, but that doesn't mean I can't listen to what Dr. Lewis has to say at sometime in the future and decide if it's appropriate then. I had the impression, in all candor, that the jury wasn't impressed by the psychiatric evidence on either side, but that's the conversations sometime past. The fellow who was the foreperson of the jury was a member of the church that I attend, and from time to time he would just ask what the status of the case was and made some comments from time to time. He was just curious and interested what all was going on. He's, as I said, is since deceased. I think my conversations with him were pretty well limited to that. People made comments from time to time about what their impressions were, and those were his impressions, and I'm not sure if he's speaking for the jury or not. He purported to be, but I'll just take it for his value alone. I am going to deny the motion. Where do we go from here, ladies and gentlemen?

(2nd29.15Tr.13-14)(emphasis added).

Judge Syler's Statements To Direct Appeal Counsel

During 29.15 counsel's redirect questioning of direct appeal counsel Wafer about her failure to raise proportionality the following occurred:

Q Would you agree that that fact that the defendant received death for one victim and life without for another victim where the circumstances were

essentially the same, in the same case, would be something to consider in regard to proportionality review?

A There were similarities in the circumstances. Both victims were the parents of Terrance's girlfriend. And again, I'm a little fuzzy on the facts. It's been a while, but my recollection is that he was sentenced to life for Stephen's murder, and that was an encounter outside the house. Excuse me. And it was just Stephen alone. Debbie's, the facts of Debbie's murder were a little different.

Q But the mitigation in regard to Terrance Anderson would have been the same?

A Oh, yeah.

MS. LEFTWICH: I have nothing further.

MR. BRUCE: I don't have any further questions, Your Honor.

THE COURT: Thank you. I'll state for the record what I wouldn't state off the record, and that is that some, just so you'll know, some years after this occurred, the foreperson of the jury was asking about the status of your appeal. And **I was curious myself** about the reason for the one life and one death sentence, and his explanation was that **the jury was offended** by the fact that the defendant was holding -- I'm sorry -- the mother, the grandmother, Debbie, was holding the baby at the time that she was killed, and that's what put them over.

MS. LEFTWICH: Your Honor, I hate to -- I'm sorry to interrupt. I didn't know, I didn't think -- Were we just on the record?

THE COURT: Yes.

MS. LEFTWICH: For the record then, I would object to the insertion of that statement from the foreperson of the jury, seeing as how we have not had a chance to talk with him ourselves or cross examine him about that information. And my understanding from a previous statement of yours is that he is now deceased. Is that correct?

THE COURT: You are correct. I'm not taking that into consideration in my decision of this matter. I'm just **explaining for the benefit of the person that worked on the appeal why the jury did what they did** according to him, and he is now deceased.

MS. LEFTWICH: I understand, Your Honor, but for purposes of the record, I just want to object to that.

THE COURT: That's why I made the comment on the record rather than off the record. Having said that, is there anything else for this witness?

MS. LEFTWICH: No, Your Honor.

(2nd29.15Tr.234-36)(emphasis added).

A Reasonable Person Would Believe Judge Syler Could Not Fairly Serve

Judge Syler's statements at the hearing to transport demonstrate his prejudgment. Syler's extrajudicial conversations with the foreperson were the basis

for his statement that evidence that might be presented through Lewis and Holcomb "was so discredited the first time around that it was not necessary to put it on the second time."(2nd29.15Tr.7). This statement demonstrates prejudgment. *See Haynes.*

It was Syler's discussions with the foreperson that gave Syler "insight" to conclude that he did not "buy any of it" as to the need to do 29.15 testing that would then be incorporated into the views Lewis and Holcomb might hold(2nd29.15Tr.7-8). This statement further shows prejudgment by Syler. *See Haynes.*

At the motion to disqualify hearing, Syler stated that from what the foreperson told him he had concluded that "the use of Ms. Lewis or Dr. Lewis, I should say, was ineffective." (2nd29.15Tr.13). Syler continued that "was a decision made by the jury" and he "agreed with what they thought"(2nd29.15Tr.13). These statements again demonstrate Syler prejudged the claims as to Lewis and Holcomb because of his conversations with the foreperson. *See Haynes.*

Moreover, Syler's statements to direct appeal counsel Wafer at the conclusion of her testimony underscore his prejudgment of the claims relating to Lewis and Holcomb. Syler told direct appeal counsel that he "was curious" about why the jury imposed death on one count, but life on the other(2nd29.15Tr.234-35). Syler then proceeded to endorse as fact that the different punishments were as reported by the foreperson to Syler that "the jury was offended" by the fact Debbie was holding Kyra when she was shot(2nd29.15Tr.234-35).

Particularly poignant in demonstrating Syler's prejudgment were his findings which expressly incorporated what the foreperson told him. The record expressly refutes respondent assertions that "[t]here is nothing in the record to suggest that the court would not have given fair consideration to any test results supporting any of Appellant's mental health claims"(Resp.Br.26-27). Syler rejected the separate distinct claims for failing to call Dr. Lewis to testify about Robert's violent history (Point II) and Terrance's psychotic depression characterized by paranoia and delusions supporting the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment (Point IV) finding as follows:

> Dr. Lewis testified at the first trial to the very things Movant claims she should have **repeated** in his second trial. Trial counsel was not ineffective in concluding that a claim of diminished mental capacity was not successful, and would not be successful with a second jury. **The Court is aware that the first jury did not find Dr. Lewis credible and informed the parties of this fact.** Dr. Lewis' testimony that Movant was hearing "voices" is at odds with Dr. Holcomb. She also appears, frankly gullible to believe Movant was hearing voices. Her explanations why she believes Movant was "delusional" or in an "altered state" at the time of the murder is not persuasive at all.

(2nd29.15L.F.202-03)(emphasis added). The reason Syler "was aware" the first jury did not consider Lewis credible was the first trial jury foreperson told Syler that during their numerous extrajudicial contacts years after the first trial(2nd29.15Tr.7-8,13-14). This finding expressly shows that Syler invoked what the foreperson told

him and used that information to reject Terrance's two distinct 29.15 claims as to the failure to call Dr. Lewis. If Syler was not taking into account what the foreperson reported to him in denying the 29.15 claims, then there would be no reason for him to inject and rely on what was reported to him and include that in the findings. Respondent asserts that Syler stated that he would treat what the foreperson told him as only the foreperson's opinion (Resp.Br.20), but Syler's finding here states that "the first jury," not the first trial's foreperson found Lewis not credible. In addition to this finding, Syler attributed at the motion to disqualify hearing what the foreperson reported to the entire jury, not just the foreperson, when he stated:

> Well, the only point I was trying to make was that it appeared from the comments of the foreperson of the jury that the use of Ms. Lewis or Dr. Lewis, I should say, was ineffective. That was a decision made by **the jury**, not by the Court. Frankly, **I agreed with what they thought** ….

(2nd29.15Tr.13)(emphasis added). Here, Syler endorsed that what the foreperson reported to him was what "the jury" found and Syler "agreed" with what "they [the jury] thought."

Syler's prejudgment is further highlighted through his findings, quoted *supra*, that counsel was not ineffective for failing to calling Lewis to "repeat" at the retrial "the very things" she testified to at the first trial(2nd29.15L.F.202-03). Lewis, however, did not testify at the first trial about Robert's violence, and therefore, Lewis was not to be called to "repeat" her first trial testimony.

The degree to which Syler's findings treated this 29.15's allegations as involving merely calling Lewis to "repea[t]," her first trial testimony (2nd29.15L.F.202-03), *supra*, demonstrates Syler's appearance of unfairness because that finding ignores the distinct purposes for which Lewis was called at the first trial versus the purposes for which she should have been called at the retrial. At the first trial, Lewis was called in support of a guilt phase diminished capacity defense(1stTrialEx.E at 35-47,58). At the first trial, Lewis found that Terrance was paranoid, delusional, severely depressed, and in an altered state such that he was suffering from a mental disease or defect that prevented cool reflection(1stTrialEx.E at 43-47,58). At this 29.15, it was alleged that Lewis should have been called to testify about the impact on Terrance of Robert's violent abusive behaviors for its mitigating value. *See* Point II Original Appellant's Brief. Further, this 29.15 alleged that Lewis should have been called to testify to mitigating evidence that Terrance suffered from a psychotic depression characterized by paranoia and delusions while living in dysfunctional family circumstances which would have supported the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. *See* Point IV Original Appellant's Brief. That Syler rejected the distinctive 29.15 mitigation claims here based on what the first trial's jury foreperson reported to Syler was that entire jury's view about Lewis' guilt phase diminished capacity defense established the appearance of unfairness in Syler deciding this 29.15. *See Smulls* and *Aetna*.

Syler's prejudgment was demonstrated when he took the extraordinary act of handing 29.15 counsel a New Yorker article that discussed Lewis on matters that had absolutely no connection to this 29.15(2nd29.15L.F.151-52,163-67). This action considered in the entire context of everything else Syler said and did demonstrates Syler prejudged matters regarding Lewis and Holcomb as well. *See Hunter*, *supra*. Considering all of Syler's statements and actions in the context of the entire record, *Hunter*, *supra*, Syler would not have handed counsel the New Yorker article unless he believed its contents somehow confirmed what the foreperson had reported to Syler was the first trial's jury's views of Lewis that Lewis was "ineffective"(2nd29.15Tr.13-14).

At the hearing on the motion to disqualify Syler, and after Syler stated he "agreed" with the first "jury," Syler professed that he could still "listen" to what Lewis would say(2nd29.15Tr.13-14). Syler, however, had already professed to agreeing with what the foreperson reported to him as constituting the first trial's jury views on Lewis when he stated at the earlier hearing to transport for testing he did not "buy any of it" (2nd29.15Tr.6-8) - a reasonable person would have grounds to find an appearance of impropriety and doubt the impartiality of the court. *See Smulls*,935S.W.2d at 17 and *Aetna*,475U.S. at 825. Moreover, a reasonable person who heard Syler say at the disqualification hearing that the foreperson told him the use of Lewis was "ineffective" and he "agreed with what they [the jury] thought"(2nd29.15Tr.13-14) would have grounds to find an appearance of impropriety. *See Smulls* and *Aetna*.

Syler stated to direct appeal counsel that he "was curious" about the difference in sentences on the two counts and the foreperson told him that "the jury" was offended by the fact Debbie was holding Kyra when she was shot(2nd29.15Tr.234-36). When 29.15 counsel objected to Syler injecting that matter Syler stated that he was "explaining" for direct appeal counsel "why the jury did what they did according to him [the foreperson]"(2nd29.15Tr.234-36). Syler then professed that he was not taking into account the foreperson's reporting(2nd29.15Tr.234-36). If Syler was not taking into account what the foreperson reported to him as the reason for the jury's verdict and his perception of its relevance to the 29.15 claims, then there was no reason for him to "explain" to direct appeal counsel what the foreperson reported. Moreover, Syler's statements to direct appeal counsel Wafer show that he must have credited what the foreperson reported as accurate.

Respondent states: "The court reiterated in its written findings that it did not consider the information obtained from the foreman in making any decision about the case, but just provided the information to Wafer to help her understand the jury's verdict"(Resp.Br. at 24 relying on 2nd29.15L.F.193). In Syler's findings as to direct appeal counsel's failure to raise a proportionality claim he stated as follows:

> During Ms. Wafer's testimony, the Court related on the record a conversation he had with the jury foreman who indicated that the reason Movant received death for the murder of Debbie Rainwater, but not Steven Rainwater, was because the jury was troubled by Movant shooting Debbie while she held the baby. The Court makes clear that it has not considered this

information in making any decision about this case, but provided it to Ms. Wafer to **help her understand the jury's verdict**.

(2nd29.15L.F.193)(emphasis added). If Syler was not crediting and relying on what the foreperson reported to him in rejecting the 29.15 claims, then there would be no reason for him to invoke in the findings what the foreperson reported to him as something which would "**help**" Wafer **"understand the jury's verdict.**"

That Judge Syler made statements professing that he could fairly serve here is not grounds for finding that he could properly serve. Syler's prejudgment required his disqualification, despite such assertions. In *State ex rel. McCulloch v. Drumm*,984S.W.2d555,556-58(Mo.App.,E.D.1999), Judge Drumm made statements at sentencing that if he had been the finder of fact, rather than the jury, then we would not have convicted the defendant and found her not guilty by reason of mental disease or defect. After the defendant's conviction was reversed on appeal, the case was returned to Judge Drumm for retrial and Drumm granted the defendant's request for a bench trial. *Id*.557. The state then moved to disqualify Drumm from the bench trial because of his sentencing statements. *Id*.556-58. At the hearing on the motion to disqualify Drumm "testified that even though he had formed opinions on the case at that time [prior trial], he would not let his former opinions on the issue of mental disease or defect affect his judgment in the upcoming jury-waived trial." *Id*.557. The Court of Appeals noted that it had "no doubt" Drumm could fairly serve, but the standard for disqualification was whether a reasonable person would have factual grounds to doubt Drumm's impartiality, and therefore, he was required to be

disqualified. *Id.*557-58. Despite Syler's assertions that he could fairly serve a reasonable person would have grounds to doubt his ability to do so in light of all he said and did showing his prejudgment of matters involving Lewis and Holcomb. *See Drumm*. Syler, like Drumm, expressed opinions and engaged in behaviors prejudging mental health evidence that he was required to rule on, and therefore, he was required to be disqualified. *See Drumm*.

Respondent asserts that testimony trial counsel Davis-Kerry gave about the different sentences imposed as to Debbie versus Stephen legitimates Syler having remained on the case because Syler did not inject with Davis-Kerry what was reported to Syler by the first trial's foreperson(Resp.Br. at 28 n.4 relying on (2nd29.15Tr.317)). Davis-Kerry speculated that one possible explanation for the different sentences might be attributable to Debbie being shot while she was holding Kyra, whereas Stephen was armed and confronted Terrance outside the house(2nd29.15Tr.317). That Syler did not also inject with Davis-Kerry what the foreperson reported to him simply does not in any way demonstrate Syler was able to fairly serve in light of all that Syler said prior to her testimony regarding what the foreperson reported to him and when considering the entire record. *See Hunter*.

Respondent relies on *Davis v. Schmidt*,210S.W.3d494,520(Mo.App.W.D.2007) to state that opinions and beliefs a judge forms about a party or the party's claim from hearing that case are completely natural and proper and do not constitute a disqualifying appearance of bias(Resp.Br.25-26). Judge Syler did not form his opinions about Lewis' "effectiveness" from matters based upon hearing Terrance's

case. Syler formed those opinions and beliefs from his multiple extrajudicial conversations with the first trial's foreperson years after the first trial and not from matters that took place before him in court. The substance of the complaint in *Schmidt* was the trial court on its own motion should have disqualified itself because of its rulings that were founded on matters that took place in court. *Id.*519-20. The appearance of Syler's bias was premised on his extrajudicial contacts with the first trial's foreperson and his endorsement of the views held by that foreperson and not his rulings arising from what he heard in court. *See State v. Nicklasson*,967S.W.2d596,605(Mo.banc1998).

Respondent also relies on *In re C.N.H.*,998S.W.2d553,560(Mo.App.,S.D.1999) for the proposition that a judge is allowed to form and give tentative opinions based upon what is before him because such opinions are not fixed and can be put aside(Resp.Br.35-26). Here, Syler's stated opinions endorsed the first trial foreperson's views which Syler acquired through extrajudicial contacts with that foreperson years after the first trial and not through matters he properly heard in this 29.15 case.

Respondent relies on *State v. Hunter*,840S.W.2d850,866(Mo.banc1992), where this Court found the trial judge's comments did not require disqualification(Resp.Br.26). There the judge after having been presented psychiatric evidence for his consideration made disparaging remarks about a particular psychological test methodology included in that evidence. *Id.*865-66. The judge also stated he '"somewhat agreed"' with some of the defendant's own observations

disparaging psychiatrists. *Id.*865-66. *Hunter*, like other cases respondent cites, involves allegations of grounds for disqualification based upon the judge's conduct which had its origin in matters that transpired in court before the judge and not extrajudicial contacts, as occurred here.

Relying on *Hunter*, respondent argues that Syler's "skepticism in this case about the efficacy of mental health evidence was based on the jury's rejection of that evidence in the first trial"(Resp.Br.26). Syler had no basis for skepticism about any mental health evidence except for the views originating from the first trial's foreperson which occurred because of his extrajudicial contacts with the foreperson years after the original trial. That is shown by Syler's statement to direct appeal counsel that he asked the foreperson the reason for the different punishment verdicts because "I was curious myself"(2nd29.15Tr.234-36). Moreover, as discussed the mental health evidence that was presented at the first trial went to the guilt phase defense of diminished capacity, which is significantly different than the abuse evidence that could have been presented in mitigation. *See* Original Brief at 70-71. Syler's prejudice was not some "impersonal prejudice resulting from background experience" (Resp.Br.26), his prejudice came from his extrajudicial contacts with the foreperson.

Respondent relies on *Graham v. State*,11S.W.3d807,814(Mo.App.,S.D.1999) citing it for the proposition that remarks made at the bond reduction hearing did not establish the appearance of bias, especially since the bond reduction was granted(Resp.Br.26). The granting of the bond reduction was not what demonstrated

a lack of the appearance of bias. The reason the judge's bond reduction statements did not reflect the appearance of bias was his statements merely echoed what the state had alleged in its information and the judge had referenced those matters as allegations and not as proven fact. *Id.*814. Once again statements based upon matters that were part of in-court proceedings in *Graham*, rather than extrajudicial contacts as happened here, was the reason why there was no appearance of bias.

Respondent states that Syler "concluded that Dr. Lewis testified at the first trial to the very things that Appellant claimed she should have testified to in the second trial"(Resp.Br.22 relying on 2nd29.15L.F.22). Respondent goes on to state that Syler found counsel "was not ineffective for determining that a claim of diminished capacity was not successful in the first trial and would not be successful with a second jury" (Resp.Br.22 relying on 2nd29.15L.F.202-03). Respondent also asserts that Syler found that the mental health evidence presented at the first trial was discredited based on the jury's verdict(Resp.Br.27 relying on 2nd 29.15L.F.186). What all these findings and assertions demonstrate is that Syler took what the first trial foreperson reported about the first trial's jury finding on diminished capacity and applied them to reject the two vastly distinctive mitigation claims alleged in this 29.15 - Robert's violent history and the §565.032.3 statutory mitigators extreme emotional distress and substantial impairment. *See* Original Brief Points II, IV, and V.

Respondent cites *Grissom v. Grissom*,886S.W.2d47,56-57(Mo.App.,W.D.1994) as standing for ex parte communications do not require disqualification when the record demonstrates a court's decision was based on the law

and the facts (Resp.Br.27). The record here as discussed, *supra*, shows that Syler relied on the first trial's foreperson reporting of the jury's opinions about Lewis' first trial diminished capacity defense testimony in his statements at the motion to transport for testing hearing, the hearing to disqualify, during direct appeal counsel Wafer's testimony, and the findings. Thus, unlike *Grissom*, Syler's decision was based on his numerous extrajudicial contacts with the foreperson over the course of years.

Respondent relies on *State v. Simmons*,955S.W.2d729,744(Mo.banc1997) as holding that the judge there was not required to disqualify himself from the 29.15 where at sentencing he made comments that the defendant deserved the death penalty(Resp.Br.29). This Court found it was proper for that judge to serve at the 29.15 because his comments merely expressed reasons for agreeing with the jury's verdict. *Id.*744. Here, Syler acquired his information from the extrajudicial source of the foreperson who held out what he reported to Syler as the view of "the jury" and Syler endorsed what the foreperson reported as the view of the jury(2nd29.15Tr.13-14,234-36).

Taking into account all that Syler said and did, a reasonable person would have grounds to find an appearance of impropriety in him serving, despite his assertions to the contrary that he believed he could be fair. *See Smulls*, *Aetna*, and *Drumm*. It does not matter what Syler might have personally believed and professed as to his ability to fairly serve because the standard is what a reasonable person viewing Syler's actions would be led to conclude about Syler's ability to fairly serve. *See Smulls*, *Aetna*, and

Dumm. All that Syler said and did created an appearance of impropriety to a reasonable person. *See Smulls*, *Aetna*, and *Drumm.*

A new hearing before a different judge is required.

II. & III.

STEPFATHER ROBERT'S VIOLENCE

The motion court clearly erred in denying the 29.15 claims counsel was ineffective for failing to call Dr. Lewis to testify for the limited purpose of the impact on Terrance of his stepfather Robert's violent, abusive behaviors and failing to call Earline Smith to testify about Robert's violence because the "decision" not to present Robert's violence was premised on counsels' mistaken belief these matters were presented at the first trial, when they were not, and counsel wanted to do something "different" from the first trial by avoiding Robert's violent history. Because the "decision" not to present evidence of Robert's violence was premised on the mistaken belief the first trial's jury heard about Robert's violence that "decision" could not be a reasonable strategic "decision."

There was direct evidence Robert physically abused Terrance and exposed Terrance to violence directed at others and counsel possessed documents detailing these matters. Dr. Lewis found Robert had intentionally broken Terrance's leg when he was four years old. Drs. Pincus and Cross saw cigarette burns on Terrance's back that Robert inflicted. Robert's arrest records documented violent acts Robert committed while Terrance was a child growing-up in Robert's household.

Respondent asserts that counsel was not ineffective for failing to call Dr. Lewis to testify for the limited purpose of the impact on Terrance of his stepfather Robert's

violent, abusive behaviors and failing to call Earline Smith to testify about Robert's violence because counsel considered presenting that evidence, "but decided instead to pursue a **different** reasonable strategy"(Resp.Br.37-41)(emphasis added).[2] In making its arguments, respondent relies on *Edwards v. State*,200S.W.3d500(Mo.banc2006). Terrance was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, XIV.

Initially, this Court should note that the record is **unmistakably clear** that both Davis-Kerry and Turlington testified that their choice of a mitigation strategy was premised on taking a "different" mitigation approach from what the first trial's counsel had done and that approach existed **while they were preparing for the penalty phase retrial**(*See* 2nd29.15Tr.320-21,335-36,374). Respondent asserts Davis-Kerry's 29.15 testimony did not "establish whether she held that mistaken belief [they were doing something "different"] while she was preparing for trial, or if she only held it at the time of the Rule 29.15 hearing"(Resp.Br.40 n.9). Davis-Kerry testified that at the first trial there was evidence of Robert's violent propensities presented and at the retrial the defense team "wanted to try a different approach"(2nd29.15Tr.272). Davis-Kerry, in particular, testified as follows:

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[2] Respondent has filed a single combined response to Terrance's Points II and III and treated those points as presenting identical issues. To avoid unnecessary repetition, this reply brief submits a combined response to respondent's arguments as to Points II and III.

Q And is that based on your experience?

A Yes, it is.

Q In this particular case, in representing Mr. Anderson, did **you and Ms. Turlington** then come up with an approach in presenting your evidence to the jury?

A Yes, we did.

Q And what was that?

A **We wanted to take a different approach than what had been done before.** We wanted to –

Q And can I?

A Sure.

Q If you don't mind my interrupting you, at least is part of the reason why you did that is because what happened before wasn't successful?

A It was partially successful. I mean, it saved him from a death sentence in Mr. Rainwater's death, but **we wanted to do something different**. I mean, it didn't work as far as what happened to Debbie Rainwater. It didn't work as far as punishment the jury adduced on Terrance for murder of Deborah Rainwater. **We wanted to do something different.**

(2nd29.15Tr.320-21)(emphasis added). Davis-Kerry was very clear in the above testimony that at the time she and Turlington were preparing for trial they believed they were in fact doing something "different" from what counsel did at the first trial as to the mitigation case. Davis-Kerry's belief that she and Turlington were doing

something "different" was not something limited to the time of Davis-Kerry's 29.15 testimony, but rather commenced at the time she and Turlington prepared their defense of Terrance.

While counsel professed that their approach to mitigation was intended to be "different" from the first trial(2nd29.15Tr.320-21,335-36,374), it was not. The first penalty phase was devoted to calling family and friends to testify about Terrance's athletic accomplishments, his good work ethic, his polite and respectful behavior, and people's inability to comprehend what caused Terrance to do the shooting(1stTrialTr.1670-1703). The retrial penalty witnesses focused on these same themes(2ndTrialTr.730-40,742-46,798-803,804-14,839-43,883-90). At the first penalty phase, the jury heard from Robert, as it did in the retrial, about the model father that he was(1stTrialTr.1670-80;2ndTrialTr.849-61). Thus, the approach to mitigation witnesses was **the same, not "different**."

Respondent represents that Terrance's counsel investigated evidence of Robert's violence, but strategically decided not to present it(Resp.Br.38). Respondent asserts that counsel could forego presenting evidence of the abuse Terrance endured because in *Edwards* this Court found such a strategy was reasonable(Resp.Br.37). However, while so holding in *Edwards* this Court relied on the following: "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]"' *Edwards*,200S.W.3d at 516(quoting *Strickland v. Washington*,466U.S.668,690(1984)). In Terrance's case there was not a thorough investigation of the facts because counsel believed that

evidence of Robert's violence was presented at the first trial when it was not. For trial strategy to be a proper basis to deny postconviction relief, the strategy must be reasonable. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). It cannot be a reasonable strategy to fail to present evidence of Robert's violence because counsel was mistaken as to the facts believing that evidence was presented at the first trial, when it was not. *See Edwards* (quoting *Strickland*) *supra*.

Respondent asserts that there was no evidence directly establishing that Terrance suffered abuse that Robert inflicted on him or that Terrance witnessed abuse Robert inflicted on others(Resp.Br.38-39). The record expressly shows otherwise. *See* Original Brief discussion at 52-54, 56-58,69.

Terrance lived with Robert from the time he was ten months old(2ndTrialTr.850). Dr. Lewis had found as early as her June, 1998 report that Terrance had sustained a spiral tibial fracture and such fractures are caused by intentional twisting actions and not accidental impact(1st29.15Ex.4 at 1158). From the first 29.15, Dr. Cross found that Robert intentionally broke Terrance's leg when he was four years old and that was based on Dr. Lewis' findings in her June, 1998 report(1st29.15Tr.119-20,136-37;1st29.15Ex.4 at 1158 and 2nd29.15Ex.D at 2); *See* Original Brief at 52-54. Cross saw cigarette burns on Terrance's back, which Dr. Pincus' first trial report discussed, and evidenced Robert abused Terrance(1st29.15Tr.134-36). *See* Original Brief at 52-54. These matters were direct evidence Terrance suffered abuse Robert inflicted.

Also from the first 29.15, licensed clinical social worker Alfonso recounted that Robert had a history of abusive behavior and used coercive control, intimidation, and violence to control the household in which Terrance was raised(1st29.15Tr.56). *See* Original Brief at 52-54. Alfonso found that Terrance either tried to intervene or isolated himself by withdrawing and locking himself in his room(1st29.15Tr.56,60-61,63). *See* Original Brief at 52-54.

Besides what Cross and Alfonso found, Robert's police arrest records reflected four violent incidents which occurred **while Terrance was a child between the ages of five and fourteen and residing with Robert**. *See* Original Brief at 56-58,69. On March 31, 1981, there was an altercation that **began at the family home** involving Robert and three other individuals that escalated into Robert using his car to force them off the road and then Robert fighting with them using a tire iron and a knife(2nd29.15Tr.183-84;2nd29.15Ex.O at 17-23). On August 17, 1986, Robert **while at the family residence** fired shots at Samuel Norris saying "Fuck you" and "I kill you"(2nd29.15 Ex.O at 12;2nd29.15Tr.180-81). On August 22, 1989, Robert intentionally side swiped his girlfriend Shirley Pratt injuring her(2nd29.15Tr.185-86;2nd29.15Ex.O at 5-7). On February 6, 1990, Robert struck Shirley Pratt in the head and face with a gun while she was naked(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). During the February 6, 1990 incident, Robert pulled a gun on Shirley's brother when he came to her assistance(2nd29.15Tr.185;2nd29.15Ex.O at 1-4). These violent incidents involving Robert exposed Terrance to violence directed at others.

Respondent asserts that there is no requirement that counsel have pursued an "entirely different approach from the previous trial"(Resp.Br.40-41). What is significant is that counsel believed that by not putting on evidence of all of Robert's violence that they were doing something "different" from the first trial, when in fact they were doing the same as the first trial. This mistaken belief established counsel did not make a reasoned and reasonable strategic decision to avoid evidence of Robert's violence. *See Butler*,108S.W.3d at 25;*McCarter*,883S.W.2d at 77-79. There is a long held societal belief that a disadvantaged background, and in particular a background of abuse, may make a defendant less morally culpable. *See Wiggins v. Smith*,539U.S.510(2003); *Penry v. Lynaugh*,492U.S.302,319(1989); *Williams v. Taylor*,529U.S.362(2000); *Rompilla v. Beard*,545U.S.374(2005); *Porter v. McCollum*,130S.Ct.447(2009); and *Griffin v. Pierce*,622F.3d831(7thCir.2010) (all discussed in detail in Original Brief Point II). Counsel's failure to present evidence of Robert's violence was unreasonable because it was based on the faulty premise counsel was doing something "different" and Terrance was prejudiced.

Counsel failed to present evidence of Robert's violence because of inadequate preparation and investigation into the record that had preceded them when they mistakenly believed evidence of Robert's violence was presented at the first trial(2nd29.15Tr.272). *Cf. Wiggins v. Smith*,539U.S. at 524-26,534-35(failure to present evidence of abuse caused by inadequate preparation and investigation). Counsel's failure here was the result of inattention, not reasoned judgment, for failing

to know that at the first trial the jury did not hear evidence of Robert's violence(2nd29.15Tr.272). *Id.*524-26,534-35.

A new penalty phase is required.

CONCLUSION

For the reasons discussed in the original and reply briefs, this Court should order the following: (a) Points II through IX - a new penalty phase; (b) Point I - a new 29.15 hearing before a different judge; and (c) Point X - impose life without parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,523 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in September, 2012. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix has been served electronically using the Missouri Supreme Court's electronic filing system this 18th day of September, 2012, on Assistant Attorney General Daniel N. McPherson at dan.mcpherson@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
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